Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

COMPANIA FINANCIERA ECUATORIANA DE DESAROLLO, S.A.,

Petitioner,

vs.

THE CHASE MANHATTAN BANK, successor in interest to Manufacturers Hanover Trust Company,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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72 pp

QUESTION PRESENTED

Whether the interpretation adopted by the Second Circuit that COFIEC was not entitled to the return of certain interest payments on Republic of Ecuador debt that Chase purchased from COFIEC rendered provisions of the parties' contract completely superfluous in violation of fundamental contract principles.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Petitioner, Compania Financiera Ecuatoriana De Desarollo, S.A., certifies that it has no parent company or non-wholly owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Compania Financiera Ecuatoriana De Desarollo, S.A. ("COFIEC"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on November 2, 1998, affirming the judgment of the district court dismissing COFIEC's complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unpublished by order of the Second Circuit. It is reprinted in the appendix hereto at App. 1.

The opinion and order of the United States District Court for the Southern District of New York (Koeltl, D.J.) is reported at 1998 WL 74299. It is reprinted in the appendix hereto at App. 4.

JURISDICTION

On February 18, 1998, the United States District Court for the Southern District of New York issued an opinion and order dismissing COFIEC's complaint and closing the case. COFIEC timely appealed to the Second Circuit, which affirmed in an opinion filed on November 2, 1998. This petition is filed pursuant to Rule 13, Rules of the Supreme Court of the United States. The jurisdiction

of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

STATEMENT OF THE CASE

On April 15, 1997, COFIEC filed a five (5) count Complaint in the 11th Judicial Circuit in and for Dade County, Florida against The Chase Manhattan Bank ("Chase") as successor-in-interest to Manufacturers Hanover Trust Company ("MHT"), alleging breach of contract (Count I), conversion (Count II), unjust enrichment (Count III), constructive trust (Count IV) and common law indemnification (Count V). (App. 17-25). COFIEC's claims were all based upon Chase's failure to pay COFIEC funds due to COFIEC consisting of interest that had accrued prior to July 31, 1990 on Republic of Ecuador debt that COFIEC sold to MHT on October 15, 1990, which debt was redeemed by the Republic of Ecuador in August 1995.

The allegations in the complaint established that, between the months of August and December 1988, COFIEC purchased from three separate entities, Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill"), Swiss Bank Corporation ("SBC") and Security Pacific Bank ("SPB"), various amounts of Republic of Ecuador debt. (App. 18-19). In the agreements between COFIEC and each of the selling entities, it was specifically provided that the selling entity was retaining the right to receive any interest that accrued prior to the effective date of their respective agreements. (App. 18-19). Interest

on all of the obligations purchased by COFIEC from Merrill, SBC and SPB accrued quarterly. (App. 19).

On or about October 15, 1990, COFIEC and MHT executed an Assignment and Agreement (the "Agreement"),[1] pursuant to which COFIEC sold to MHT the obligations purchased by COFIEC from Merrill, SBC and SPB (collectively, the "Obligations"). (App. 19-20). Pursuant to the Agreement, COFIEC sold to MHT the right to all interest accruing on the Obligations for the period of July 31, 1990 through October 31, 1990, and thereafter. (App. 20). This was made clear in the numerous exhibits to the Agreement, each of which define the "Interest Period" to be "July 31, 1990 to October 31, 1990". At no time did COFIEC sell, or intend to sell, to MHT any interest which had accrued or was outstanding on the Obligations prior to July 31, 1990. (App. 20).

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[1] COFIEC attached to its complaint a copy of the Agreement that was signed only by a representative of COFIEC. In support of its motion to dismiss, Chase proffered a copy of the Agreement signed by representatives of both COFIEC and MHT. While the text of both agreements are identical, the exhibits attached thereto do differ. Notwithstanding, because all versions of the exhibits contain the same language limiting the assigned interest to the period from July 31, 1990 to October 31, 1990, and thereafter, COFIEC agreed that it made no difference to its position whether the district court considered its or Chase's version of the Agreement and, in fact, agreed that the district court could do so. Consequently, the district court did consider Chase's proffered version of the Agreement for the purpose of ruling upon Chase's motion to dismiss, but opined that the result would not have changed had it considered COFIEC's version. (App. 6).

The Agreement unambiguously provided in paragraph 5, subsection (b) that, if MHT received any interest payments belonging to COFIEC, MHT was obligated to hold said monies in trust for COFIEC and promptly pay those monies to COFIEC:

> ***If either the ASSIGNOR [COFIEC] or the ASSIGNEE [Chase] receives any payment of interest or principal which is for the account of the other*** (the amounts of any such payment of interest or principal which are for the accounts of parties being determined, ***in the case of a payment of interest, in proportion to the interest accrued to each of the parties*** at the date of payment and, in the case of a payment of principal, in proportion to the principal owed to the parties at the date of payment) then the ASSIGNOR [COFIEC] or the ASSIGNEE [Chase], as the case may be, shall hold the same in trust for the other and shall promptly pay the same to the other (emphasis added).

(App. 30).

After discovering that Chase was paid for the Obligations, including all of the interest that accrued prior to July 31, 1990, COFIEC demanded that Chase pay COFIEC all of the interest collected by Chase for the period of time prior to July 31, 1990, but Chase failed and refused to do so. (App. 20). Pursuant to the terms of their agreements with COFIEC, Merrill, SBC and SPB have demanded that COFIEC pay to them all of the interest that accrued prior to the closing date for each of their respective transactions. (App. 20).

The action was ultimately removed by Chase and an agreed order was entered, transferring venue to the

United States District Court for the Southern District of New York. The jurisdiction of the district court was invoked under 28 U.S.C. § 1332, based upon diversity of citizenship. Thereafter, Chase served its motion to dismiss the complaint pursuant to Rule 12(b)(6).

On or about February 18, 1998, the Honorable John G. Koeltl, United States District Judge, entered an opinion and order granting Chase's motion to dismiss in its entirety and directed the clerk of the court to enter judgment dismissing COFIEC's complaint and closing the case. (App. 4-14). In accordance therewith, on February 23, 1998, a judgment granting Chase's motion and closing the case was filed. (App. 15-16).

In its opinion and order dismissing COFIEC's complaint, the district court found that, as a matter of law, the language of the Agreement was unambiguous and was subject to only one reasonable interpretation. (App. 11). Specifically, the Court held that the terms of the Agreement provided that COFIEC assigned to Chase all interest that accrued prior to and after the effective date of the Agreement. The court further found that nothing in the Agreement or the exhibits thereto supported the interpretation to the contrary, pled in the complaint and urged by COFIEC. (App. 13). Ultimately, the district court granted Chase's motion to dismiss "since Chase was not required under the Agreement to hold any interest payments in trust for COFIEC or to transfer any interest payments it received to COFIEC." (App. 13). COFIEC filed a timely notice of appeal. After oral argument, the Second Circuit entered a summary order, which adopted

the district court's reasoning and affirmed the judgment below. (App. 1-3).

REASONS FOR GRANTING THE WRIT

BOTH THE DISTRICT COURT AND THE SECOND CIRCUIT'S RULINGS COMPLETELY MISAPPREHEND THE CONTROLLING PRINCIPLE OF LAW THAT A COURT SHOULD SAFEGUARD AGAINST ADOPTING AN INTERPRETATION OF A CONTRACT THAT WOULD RENDER ANY INDIVIDUAL PROVISION OF IT SUPERFLUOUS.

The district court and the Second Circuit's decisions directly conflict with the long standing principle that a contract should be construed to give effect to all of its provisions and to render them consistent with each other. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Sayers v. Rochester Telephone Corp.*, 7 F.3d 1091 (2d Cir. 1993).

All of COFIEC's claims were based upon Chase's failure to pay COFIEC interest that had accrued prior to July 31, 1990 on the obligations at issue. The district court and the Second Circuit overlooked the limiting language contained in the exhibits to the Agreement, and found that Chase was not required under the Agreement, under any circumstances, to hold any interest payments in trust for COFIEC or to transfer any interest payments in trust to COFIEC, despite clear provisions in the Agreement to the contrary. This finding violated controlling principles of contract law.

It is well settled that interpretation of a contract is a mixed question of law and fact, with the task being to

determine the intent of the parties. *Antilles Steamship Co. v. American Hull Ins.*, 733 F.2d 195, 199 (2d Cir. 1994). As a threshold matter, the court must inquire as to whether the contract is ambiguous, i.e., whether it is subject to at least two conflicting reasonable interpretations. *See Mellon Bank, N.A. v. United Bank Corp.*, 31 F.3d 113, 116 (2d Cir. 1994). Although the dispute may be over the meaning of specific contract clauses, the court must determine whether such clauses are ambiguous when "read in the context of the entire agreement." *Sayers, supra*, at 1095 (citing *W.W.W. Assocs. v. Giancontiei*, 77 N.Y.2d 157, 163 (1990)). By examining the entire contract, it safeguards against adopting an interpretation that would render an individual provision superfluous. *Id.* (citing *Two Guys From Harrison – N.Y., Inc. v. S.F.R. Realty Assocs.*, 63 N.Y.2d 396, 403 (1984)).

Here, the district court and Second Circuit's opinions violated these controlling principles. The Agreement and exhibits thereto unequivocally supported COFIEC's position, that (1) COFIEC only sold MHT the right to all interest **accruing** on the Obligations for the period July 31, 1990 through October 31, 1990, and thereafter; and that (2) at no time did COFIEC sell or intend to sell any interest that had **accrued** on the Obligations prior to July 31, 1990.

Paragraph 5 of the Agreement, entitled "Payment of Interest and Principal" provides, in subsection (a), that:

> Each of the ASSIGNOR [COFIEC] and the ASSIGNEE [Chase] agrees that interest on the principal amounts of the Assigned Loans which ***accrues*** prior to the Effective Date and interest thereon which accrues on or after the Effective

> Date shall also be for the account of the ASSIGNEE and payments and prepayments of the principal amounts of the Assigned Loans payable on or after the effective date shall be for the account of the ASSIGNEE (emphasis added).

Moreover, subsection (b) of paragraph 5 provides that:

> *If either the ASSIGNOR [COFIEC] or the ASSIGNEE [Chase] receives any payment of interest or principal which is for the account of the other* (the amounts of any such payment of interest or principal which are for the accounts of parties being determined, *in the case of a payment of interest, in proportion to the interest accrued to each of the parties* at the date of payment and, in the case of a payment of principal, in proportion to the principal owed to the parties at the date of payment) then the ASSIGNOR [COFIEC] or the ASSIGNEE [Chase], as the case may be, shall hold the same in trust for the other and shall promptly pay the same to the other (emphasis added).

Paragraph 3(b) of the Agreement sets the "Effective Date" as October 15, 1990. The Obligations that were sold by COFIEC to MHT are listed on composite Exhibit "A" attached to the Agreement. Each of the documents relied on by COFIEC in its Complaint, as well as the exhibits proffered by Chase, that identified the assigned obligations included the limiting language:

> **INTEREST PERIOD: July 31, 1990 TO October 31, 1990**

As the interest on all of the Obligations accrued quarterly, and as the effective date of the Agreement commenced during the latter part of the quarterly interest

period, the parties made clear in paragraph 5(a) that "interest on the principal amounts of the Assigned Loans which **accrues** prior to the Effective Date and interest thereon which accrues on or after the Effective Date shall also be for the account of the ASSIGNEE . . . ." The "interest" to which paragraph 5(a) refers is the interest **accruing** during the quarterly period commencing July 31, 1990 through October 31, 1990, and thereafter. It is for this reason that paragraph 5(a) specifically refers to the interest that "accrues", rather than the interest that has "accrued". Similarly, that is why, in paragraph 5(b), the parties made provisions for COFIEC and/or MHT (or its successor or assign) to hold interest payments that either received on behalf of the other in trust and promptly remit them to the proper party.

Accordingly, when paragraph 5(a) is read in conjunction with the exhibits submitted by COFIEC (or those proffered by Chase), limiting the interest period from July 31, 1990 to October 31, 1990, as well as paragraph 5(b), it is capable of only one reasonable interpretation – that the interest sold by COFIEC to MHT was the interest **accruing** from July 31, 1990, forward.

Notwithstanding, what the district court and the Second Circuit erroneously adopted was, in effect, an interpretation of the Agreement that all interest that accrued prior to the parties' entry of the Agreement and all interest that accrued after the entry of the Agreement was the property of Chase. If that were the case and if that were the parties' intent, they could have easily made that clear by simple language in the Agreement, such as, "all interest is assigned to Chase." Here, however, the parties went to great lengths to include terms in the Agreement and

exhibits that, among other things, identify the effective date of the Agreement, the interest period to which the reference to "interest" in paragraph 5(a) refers and to clarify the language in the Agreement to include both the past and present tense forms of the verb "accrue".

It is fundamental that a court should "safeguard against adopting an interpretation that would render any individual provision [of a contract] superfluous." *Sayers v. Rochester Telephone Corp.*, 7 F.3d 1091 (2d Cir. 1993). The district court and the Second Circuit's interpretation did just that – it rendered these terms and the differences between the forms of the verb "accrue" superfluous. More importantly, the lower courts' interpretation rendered paragraph 5(b), which required the parties to hold interest payments that either received on behalf of the other in trust and to promptly remit them, completely meaningless. If, as the district court and the Second Circuit found, COFIEC sold all interest on the Obligations to Chase, then there would never have been the need to include in paragraph 5(b) the specific language requiring that *either* party refund interest that it improperly received to the other, as Chase could never receive interest that was actually the property of COFIEC. The provision would have only stated that COFIEC was under the obligation to promptly remit payment to Chase. Paragraph 5(b) could not be more clear. "[I]n the case of a payment of interest", the obligation to refund "in proportion to the interest accrued to each of the parties at the date of payment", is mutual. (App. 30).

Notwithstanding, the district court strained in its opinion to give some meaning to Paragraph 5(b) and

focused only on the possibility of COFIEC receiving payments belonging to Chase (App. 12-13). That, however, is not what Paragraph 5(b) stated – the obligations therein, again, were mutual. This type of analysis, which failed to give the benefit of *any* doubt to COFIEC, and which actually resolved inferences *against the plaintiff*, was also inappropriate on a motion to dismiss. *See, e.g., Conley v. Gibson*, 355 U.S. 41 (1957).

At minimum, both parties offered interpretations with a basis in the language of the Agreement and exhibits. Paragraph 5(b) and the limiting language contained in each and every version of the exhibits supported COFIEC's position that it retained some of the interest. On the other hand, Chase contended that paragraph 5(a) supports its construction (which COFIEC disputed). This, at the very least, created a conflict that made dismissal inappropriate. If there are alternative, reasonable constructions of the Agreement, the issue as to what interest was assigned by COFIEC to Chase "should be submitted to the trier of fact." *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 573 (2d Cir. 1993).

In the instant case, the Agreement, along with the attached exhibits, established that COFIEC set forth a claim against Chase upon which relief could be granted. As Chase did not meet its burden under Rule 12(b), its motion to dismiss should have been denied. The district court and the Second Circuit violated cardinal principles of contract construction when they interpreted the Agreement and rendered portions of it completely superfluous. Certiorari is appropriate.

CONCLUSION

Based upon the foregoing reasons, COFIEC respectfully petitions this Court for a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of November, one thousand nine hundred and ninety-eight.

PRESENT:

JOSEPH M. McLAUGHLIN, JOSÉ A. CABRANES,
Circuit Judges,
RICHARD W. GOLDBERG,*
Judge.

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* Of the United States Court of International Trade, sitting by designation.

COMPANIA FINANCIERA
ECUATORIANA DE DESAROLLO, S.A.,

Plaintiff-Appellant,

v.

THE CHASE MANHATTAN BANK,
Successor-in-Interest to Manhattan
Hanover Trust Company,

Defendant-Appellee.

No. 98-7455

(Filed
Nov. 2, 1998)

APPEARING FOR APPELLANT:
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APPEARING FOR APPELLEE:
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Appeal from a judgment entered by the United States District Court for the Southern District of New York (John G. Koeltl, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED.**

Compania Financiera Ecuatoriana de Desarollo, S.A. ("COFIEC") appeals from a judgment of the district court dismissing, pursuant to Fed.R.Civ.P. 12(b)(6), its complaint against The Chase Manhattan Bank ("Chase"). COFIEC's complaint alleged that Chase breached a contract between the parties that purportedly entitled COFIEC to certain interest payments on Republic of Ecuador debt that Chase had purchased from COFIEC. The

district court dismissed COFIEC's complaint on the ground that, under the unambiguous meaning of the parties' agreement, COFIEC was not entitled to the interest payments at issue.

Substantially for the reasons stated in the district court's opinion, the judgment of the district court is **AFFIRMED.** *See Compania Financiera Ecuatoriana de Desarollo v. Chase Manhattan Bank,* No. 97 Civ. 5724, 1998 WL 74299 (S.D.N.Y. Feb. 19, 1998).

For the Court,
Carolyn Clark Campbell, Clerk

by /s/ Lucille Carr

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMPANIA FINANCIERA ECUATORIANA DE DESAROLLO, S.A.,

Plaintiff,

-against-

THE CHASE MANHATTAN BANK, Successor-in-Interest to Manufacturers Hanover Trust Company,

Defendant.

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97 Civ. 5724 (JGK)

OPINION AND ORDER

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JOHN G. KOELTL, District Judge:

This case involves a dispute over the interpretation of an Assignment and Agreement (the "Agreement") pursuant to which defendant Chase Manhattan Bank ("Chase"), as successor in interest to Manufacturers Hanover Trust Company, purchased Republic of Ecuador debt (the "Obligatlions") from plaintiff Compania Financiera Ecuatoriana de Desarollo, S.A. ("COFIEC"). COFIEC alleges that the Republic of Ecuador paid Chase interest that had accrued prior to July 31, 1990 on the Obligations, that Chase failed to pay that interest to COFIEC, and that the failure to pay such interest breached the Agreement. COFIEC has also pleaded claims for conversion, unjust enrichment, constructive trust, and indemnification. Chase now moves to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6).

I.

On a motion to dismiss, the factual allegations of the complaint are to be accepted as true and all reasonable inferences are construed in the plaintiff's favor. *See Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995); *Hernandez v. Coughlin*, 18 F.3d 133, 136 (2d Cir.), *cert. denied*, 513 U.S. 836 (1994). A court may also consider

documents incorporated by reference in the complaint as well as documents the plaintiff either had in its possession or had knowledge of and upon which it relied in bringing suit.[1] *See Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 48 (2d Cir. 1991), *cert. denied*, 503 U.S. 960 (1992); *I. Meyer Pincus & Assocs., P. C. v. Oppenheimer & Co., Inc.*, 936 F.2d 759, 762 (2d Cir. 1991); *Kwiatkowski v. Bear Stearns, Inc. Co.*, No. 96 Civ. 4798, 1997 WL 538819, at *1 (S.D.N.Y. Aug. 29, 1997).

A court should dismiss a complaint only "if 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Valmonte v. Bane*, 18 F.3d 992, 998 (2d Cir. 1994) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). However, where the interpretation of a contract is at issue, in considering the contract's terms to determine whether the

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[1] Attached to its complaint, the plaintiff submitted a copy of the Agreement that was signed only by a representative from COFIEC. In connection with its motion to dismiss, the defendant attached as an appendix to its moving papers a copy of the Agreement signed by representatives of both COFIEC and Manufacturers Hanover Trust Company. The difference of significance between these two versions of the Agreement is certain language in the exhibits to the Agreement referring to the calculation of interest for each obligation. At oral argument the plaintiff agreed that it made no difference to its argument whether the Court considered plaintiff's or defendant's proffered Agreement and that the Court could properly consider the defendant's version on this motion to dismiss. Therefore, the Court has considered the fully signed copy of the Agreement submitted by the defendant as the final Agreement for the purposes of this motion, although the result is not changed even if the plaintiff's copy of the Agreement is also considered.

plaintiff can prove any set of facts which would entitle it to relief, a court is "not constrained to accept the allegations of the complaint in respect of the construction of the Agreement," although all contractual ambiguities must be resolved in the Plaintiff's favor. *International Audiotext Network, Inc. v. American Tel. and Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995). Accordingly, the following facts are accepted as true for purposes of this motion.

At various times during 1988, COFIEC, a foreign entity, executed assignment agreements with Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill"), Swiss Bank Corporation ("SBC"), and Security Pacific Bank ("SPB") pursuant to which COFIEC Purchased Republic of Ecuador debt obligations. (Compl. ¶¶ 5, 7, 9.) All of this debt was purchased at very substantial discounts. The assignment agreement with Merrill Provided Ozat, "in the event that the obligations purchased by COFIEC became subject to a retroactive interest rate adjustment" the adjustment was to be paid to Merrill's account for any interest period ending prior to the date of the assignment agreement, and any interest due to the adjustment for any interest period ending after the date of the assignment agreement was for COFIEC's account. (Compl. ¶ 6.) The SBC and SPB assignment agreements provided that SBC and SPB respectively were entitled to receive all interest which accrued for periods ending prior to the dates of the assignment agreements, and COFIEC was entitled to receive interest accruing for periods ending after the dates of the assignment agreements. (Compl. ¶¶ 8, 10.) Interest on all of the obligations purchased by COFIEC accrued quarterly. (Compl. ¶ 11.)

COFIEC and Chase (as successor in interest to Manufacturers Hanover Trust) executed the Agreement on or about October 15, 1990 pursuant to which Chase purchased from COFIEC the Ecuadorian debt obligations that COFIEC had obtained from Merrill, SBC, and SPB. (Compl. ¶ 12.) The Agreement does not refer to how COFIEC had obtained the obligations or reference any of the prior assignments from Merrill, SBC, or SPB. The Agreement transfers all of COFIEC's rights with respect to the Obligations. (Agreement ¶ 2.) The Obligations were purchased by Chase at a very substantial discount.

COFIEC alleges that it sold to Chase the right to all interest accruing on the obligations for the quarterly interest period beginning on July 31, 1990 and for all interest periods thereafter. (Compl. ¶ 13.) However, COFIEC contends that it did not sell, nor did it intend to sell, any interest that had accrued on the obligations for any interest period prior to July 31, 1990. (Compl. ¶ 14.) COFIEC alleges that the Agreement required Chase to hold any payments that it received belonging to COFIEC in trust and to transfer such payments to COFIEC promptly. (Compl. ¶ 15.)

In August 1995, almost five years after the Agreement was executed, the Republic of Ecuador brought its interest payments on the obligations up-to-date and paid to Chase all outstanding interest, including interest that had accrued on the Obligations prior to July 31, 1990. (Compl. ¶ 16.) COFIEC alleges that Merrill, SBC and SPB have all demanded that COFIEC pay them the interest that had accrued prior to the closing date of each of the respective assignment agreements. (Compl. ¶ 18.) COFIEC alleges that it has made a similar demand on

Chase to pay the interest payments collected by Chase for the period prior to July 31, 1990, but that Chase has refused to pay COFIEC. (Compl. ¶ 17.) COFIEC then brought this action in circuit court in Dade County, Florida. Chase removed the case to the United States District Court for the Southern District of Florida, based on diversity jurisdiction, and the case was transferred by agreement to this Court.

II.

In its motion to dismiss, the defendant argues that the plain, unambiguous language of the contract assigned all interest payments to Chase, including interest that accrued prior to July 31, 1990, and that as a result Chase had no obligation to transfer any of the interest that it received on the Obligations from the Republic of Ecuador to COFIEC. In support of this argument, Chase points to paragraph 5(a) of the Agreement, entitled "Payment of Interest and Principal," which states:

> Each of the ASSIGNOR [COFIEC] and the ASSIGNEE [Chase] agrees that interest on the principal amounts of the Assigned Loans which accrues prior to the Effective Date and interest thereon which accrues on or after the Effective Date shall also be for the account of the ASSIGNEE and payments and prepayments of the principal amounts of the Assigned Loans payable on or after the effective date shall be for the account of the ASSIGNEE.

The effective date of the Agreement is October 15, 1990. (Agreement at 1.) Chase contends that the clear language of this paragraph assigns to Chase the right to all interest

payments accruing both before and after the effective date of the Agreement.

Under New York law, which governs this contract[2] "the initial interpretation of a contract 'is a matter of law for the court to decide.' " *K. Bell & Assocs., Inc. v. Lloyd's Underwriters*, 97 F.3d 632, 637 (2d Cir. 1996) (quoting *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295, 299 (2d Cir. 1996)); *see also Curry Road Ltd. v. K Mart Corp.*, 893 F.2d 509, 511 (2d Cir. 1990) ("Whether a contract is ambiguous is a question of law."). A court should construe a contract as a matter of law only if the contract is unambiguous on its face. *See Metropolitan Life Ins. Co. v. RJR Nabisco Inc.*, 906 F.2d 884, 889 (2d Cir. 1990). A contract is unambiguous is it "has 'a definite and precise meaning, unattended by danger of misconception in the purport of the [contract] itself, and concerning which there is no reasonable basis for a difference of opinion.' " *Sayers v. Rochester Tel. Corp. Supplemental Management Plan*, 7 F.3d 1091, 1095 (2d Cir. 1993) (quoting *Breed v. Insurance Co. of N. Am.*, 46 N.Y.2d 351, 355 (1978)); *see also United Nat'l Ins. Co. v. Waterfront New York Realty Corp.*, 994 F.2d 105, 109 (2d Cir. 1993); *Metropolitan Life Ins. Co.*, 906 F.2d at 889. If a contract is unambiguous, a court is "required to give effect to the contract as written and may not consider extrinsic evidence to alter or interpret its meaning." *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 573

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[2] The Agreement expressly provides that it shall be "governed by, and construed and interpreted in accordance with, the law of the State of New York, United States of America." (Agreement ¶ 6.) The parties agree that New York law governs the contract.

(2d Cir. 1993); *K. Bell & Assocs.*, 97 F.3d at 637. Contractual language "whose meaning is otherwise plain is not ambiguous merely because the parties urge different interpretations in the litigation." *Metropolitan Life Ins. Co.*, 906 F.2d at 889. Where the contractual language is subject to more than one reasonable meaning and where extrinsic evidence of the parties' intent exists, the question of the proper interpretation should be submitted to the trier of fact. *Consarc Corp.*, 996 F.2d at 573.

The plaintiff argues that paragraphs 5(a) and 5(b) of the contract, when read together, demonstrate that there is at the very least an ambiguity in the contract as to which interest payments COFIEC assigned to Chase. The plaintiff contends that paragraph 5 (a) only transfers to Chase "that interest which accrues prior to the Effective Date . . . for the account of the ASSIGNEE" (emphasis added). The plaintiff argues that the interest which "accrues" refers to that interest then accruing as of October 15, 1990 which would not actually "accrue" until October 31, 1990, the end of the then current quarterly interest period. Under plaintiff's interpretation, all other interest payable prior to July 31, 1990 would have already accrued and was therefore not transferred as part of the Agreement. The plaintiff also contends that paragraph 5(b) supports this construction of the Agreement since it requires both COFIEC and Chase to hold in trust and promptly pay to the other "any payment of interest or principal which is for the account of the other. . . . "

Paragraphs 5(a) and 5(b), however, are unambiguous and are subject to only one reasonable interpretation. The language of paragraph 5(a) is clear – all unpaid interest that accrues before and after the effective date of the

Agreement, October 15, 1990, belongs to Chase. COFIEC's claim that the use of the language "interest . . . which accrues prior to the Effective Date" in paragraph 5(a) refers only to interest then accruing as of the October 15, 1990 effective date as part of the July 31, 1990 to October 15, 1990 interest period "would 'strain[] the contract language beyond its reasonable and ordinary meaning.' " *Metropolitan Life Ins. Co.*, 906 F.2d at 889 (quoting *Bethlehem Steel Co. v. Turner Constr. Co.*, 2 N.Y.2d 456, 459 (1957)). The "Interest Period" upon which plaintiff relies is set forth only in the exhibits to the Agreement, and paragraph 5(a) makes no reference to the interest period or to July 31, 1990 as the date from which interest "accrues." The Agreement does not divide up the interest prior to the October 15, 1990 effective date and convey some to Chase and retain part for COFIEC. The Agreement contains no provision which would direct how such pre-effective date interest would be divided up if the parties had intended such a division. The Agreement simply conveys to Chase the interest that accrues prior to the effective date.

Moreover, if as the plaintiff alleges in its Complaint the interest on the obligations accrues quarterly, there would be no need to refer to interest in the interest period that "accrues prior to the effective date" since all such interest would not accrue until October 31, 1990, the end of the quarter. *See* Compl. ¶ 11. Exhibit A to Chase's proffered version of the Agreement provides strong support for Chase's argument that paragraph 5(a) unambiguously assigns all unpaid interest to Chase. The exhibit describes the various loans assigned to Chase and for each such loan separately refers to the total amount

assigned for the obligation as the amount of the outstanding principal plus "all accrued but unpaid interest on the foregoing principal."

Nor does paragraph 5(b) inject any uncertainty into the clear language of paragraph 5(a). Paragraph 5(b) merely provides that if either party receives a payment to which it is not entitled, it must transfer that money to the other party. Since the contract provides that Chase is to receive all of the interest, including interest which accrues before and after the effective date, Chase would never have to maintain any interest payment in trust for COFIEC. Further, although a court should "safeguard against adopting an interpretation that would render any individual provision superfluous," *Sayers*, 7 F.3d at 1095, paragraph 5(b) is not rendered academic by paragraph 5(a) since COFIEC could have improperly received payment on the Obligations from the Republic of Ecuador and would have been required to keep the money in trust for Chase.

Accordingly, the unambiguous language of the Agreement provides that COFIEC assigned to Chase both "interest on the Principal . . . which accrues prior to the Effective Date and interest thereon which accrues on or after the Effective Date." Nothing about the language of that provision nor any other provision supports the interpretation that COFIEC urges is correct. Therefore, Chase's motion to dismiss is granted since Chase was not required under the Agreement to hold any interest payments in trust for COFIEC or to transfer any interest payments it received to COFIEC.

CONCLUSION

For the foregoing reasons, the defendant's motion to dismiss is granted and the plaintiff's complaint is dismissed in its entirety. The Clerk of the Court is directed to enter judgment dismissing the complaint and closing this case.

SO ORDERED.

Dated: New York, New York
February 18, 1998

/s/ John G. Koeltl
John G. Koeltl
United States
District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

COMPANIA FINANCIERA ECUATORIANA DE DESAROLLO, S.A.,

Plaintiff,

-against-

THE CHASE MANHATTAN BANK, Successor-in-Interest to Manufacturers Hanover Trust Company,

Defendant.

----------X

97 Civil 5724(JGK)

JUDGMENT

(Filed Feb. 23, 1998)

Defendant having moved to dismiss the Complaint pursuant to FRCP 12(b)(6), and the said motion having come before the Honorable John G Koeltl, United States District Judge, and the Court thereafter, on February 18, 1998 having issued its Opinion (80146) and Order granting defendant's motion to dismiss the Complaint for failure to state a claim, and directing the Clerk to enter judgment, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion (80146) and Order dated February 18, 1998, defendant's motion to dismiss the Complaint be and it is hereby granted in its entirety and the case is closed.

DATED: New York, New York
February 23, 1998

JAMES M. PARKISON

Clerk of Court

By /s/
Deputy Clerk

IN THE CIRCUIT COURT OF THE
11th JUDICIAL CIRCUIT IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 97-8320 CA 20

FLORIDA BAR NOS. 776068
771953

COMPANIA FINANCIERA
ECUATORIANA DE DESAROLLO,
S.A.,

Plaintiff,

vs

THE CHASE MANHATTAN BANK,
Successor in interest to Manufacturers
Hanover Trust Company,

Defendant.

_____/

COMPLAINT AND DEMAND FOR JURY TRIAL

(Filed Apr. 15, 1997)

Plaintiff, Compania Financiera Ecuatoriana de Desarollo, S.A. ("COFIEC"), sues defendant. The Chase Manhattan Bank, as successor in interest to Manufacturers Hanover Trust Company ("Chase"), and, as grounds therefor, states as follows:

JURISDICTION AND PARTIES

1. This is an action for damages in excess of Fifteen Thousand Dollars, exclusive of costs, interest and attorneys' fees.

2. At all relevant times, COFIEC was a foreign entity.

3. At all relevant times, Chase was a banking association, doing business in Dade County, Florida.

4. Personal jurisdiction is proper pursuant to chapter 48 of Florida Statutes inasmuch as Chase was, at all relevant times, operating, conducting, engaging in and carrying on a business venture within Florida and, at all relevant times, was engaged in substantial and not isolated activity within Florida.

FACTUAL ALLEGATIONS

5. On or about August 16, 1988, COFIEC and Merrill Lynch Bank and Trust Company (Cayman) Limited ("Merrill") executed an Assignment Agreement (the "Merrill Assignment"), pursuant to which COFIEC purchased from Merrill One Million Dollars ($1,000,000.00) of Republic of Ecuador debt for the sum of Two Hundred Sixty Thousand Dollars ($260,000.00).

6. Pursuant to the Merrill Assignment, in the event that the obligations purchased by COFIEC became subject to a retroactive interest rate adjustment, such adjustment was to be for the account of Merrill for any interest period prior to August 16, 1988. Any interest due to such an adjustment for any period after August 16, 1988 was to be for the account of COFIEC.

7. On or about November 16, 1988, COFIEC and Swiss Bank Corporation ("SBC") executed an Assignment Agreement (the "SBC Assignment"), pursuant to which COFIEC purchased from SBC Two Million Dollars ($2,000,000.00) of Republic of Ecuador debt for the sum of Two Hundred Seventy Thousand Dollars ($70,000.00).

8. Pursuant to the SBC Assignment, SBC was entitled to receive all interest, fees and other amounts which were or became payable on any of the obligations purchased by COFIEC accrued during, or payable with respect to, periods ending prior to November 16, 1988. COFIEC was entitled to receive all interest, fees and other amounts which were or became payable on these obligations accruing during or payable with respect to periods ending on or after November 16, 1988.

9. On or about December 16, 1988 COFIEC and Security Pacific Bank executed an Assignment Agreement (the SPB Assignment"), pursuant to which COFIEC purchased from SPB One Million Dollars ($1,000,000.00) of Republic of Ecuador debt for the sum of $125,000.00.

10. Pursuant to the SPB Assignment, past due interest on the obligations purchased by COFIEC, as well as interest accrued thereon prior to December 16, 1988, belonged to SPB. Any interest accruing on or after December 16, 1988 belonged to COFIEC.

11. Interest on all of the obligations purchased by COFIEC in the Merrill Assignment, the SBC Assignment and the SPB Assignment accrued quarterly.

12. On or about October 15, 1990, COFIEC and Chase executed an Assignment and Agreement (the

"Agreement"), pursuant to which COFIEC sold to Chase, *inter alia*, the obligations purchased by COFIEC pursuant to the Merrill Assignment, the SBC Assignment and the SPB Assignment (collectively, the "Obligations"). A copy of the Agreement is attached hereto as Exhibit "A".

13. Pursuant to the Agreement, COFIEC also sold to Chase the right to all interest accruing on the Obligations for the period of July 31, 1990 through October 31, 1990, and thereafter.

14. At no time did COFIEC sell, or intend to sell, to Chase any interest which had accrued or was outstanding on the Obligations prior to July 31, 1990.

15. Additionally, pursuant to the Agreement, if Chase received any interest payments belonging to COFIEC, Chase was obligated to hold said monies in trust for COFIEC and promptly pay same to COFIEC.

16. In or about August 1995, the Republic of Ecuador paid Chase, via cash and new Ecuadorian bonds, for all of the outstanding interest on the Obligations, including the interest which had accrued on the Obligations prior to July 31, 1990.

17. COFIEC has demanded that Chase pay COFIEC all of the interest collected by Chase for the period of time prior to July 31, 1990, but Chase has failed and refused to do so.

18. Merrill, SBC and SPB have demanded that COFIEC pay to them all of the interest that accrued prior to the closing date for each of the respective transactions.

19. All conditions precedent to maintaining this action have been performed, satisfied, excused or waived.

COUNT I – BREACH OF CONTRACT

COFIEC adopts and realleges each and every allegation contained in paragraphs 1 through 19 of this Complaint as though more fully set forth herein, and alleges further:

20. On or about October 15, 1990, COFIEC and Chase executed the Agreement.

21. Pursuant to the Agreement, Chase was obligated to pay to COFIEC all amounts received by Chase as payment of interest on the Obligations which accrued prior to July 31, 1990.

22. In or about August 1995, Chase was paid by the Republic of Ecuador for all interest on the Obligations, including the interest which had accrued prior to July 31, 1990.

23. Accordingly, in or about August 1995, Chase breached the Agreement by failing to tender to COFIEC those amounts received by Chase for interest on the Obligations which accrued prior to July 31, 1990.

24. As a direct and proximate result of Chase's breach of the Agreement, COFIEC has been damaged in an amount to be proven at trial.

WHEREFORE, COFIEC demands judgment against Chase for compensatory damages, plus prejudgment interest, costs, and for such further relief as this Court deems just and proper.

COUNT II – CONVERSION

COFIEC adopts and realleges each and every allegation contained in paragraphs 1 through 19 of this Complaint as though more fully set forth herein, and alleges further:

25. In or about August 1995, Chase converted to its own use property rightfully belonging to COFIEC; specifically, the interest which had accrued on the Obligations prior to July 31, 1990.

26. Chase acted with the intent to permanently or temporarily deprive COFIEC of the interest on the Obligations which accrued prior to July 31, 1990.

27. Chase's actions were intentional, and were carried out with a wanton and reckless disregard for the rights and interest of COFIEC.

28. COFIEC has demanded that Chase tender the monies converted, but, to date, Chase has failed and refused to do so.

WHEREFORE, COFIEC demands judgment against Chase for compensatory damages, punitive damages, prejudgment interest, costs and for such further relief as this Court deems just and proper.

COUNT III – UNJUST ENRICHMENT

COFIEC adopts and realleges each and every allegation contained in paragraphs 1 through 19 of this Complaint as though more fully set forth herein, and alleges further:

29. On October 15, 1990, COFIEC assigned all of its interests in the Obligations, excluding interest accrued thereon prior to July 31, 1990, to Chase.

30. In or about August 1995, Chase was paid for all outstanding interest on the Obligations, including the interest accrued thereon prior to July 31, 1990.

31. Notwithstanding that Chase is not entitled to retain the interest on the Obligations that accrued prior to July 31, 1990, Chase has refused to tender said monies to COFIEC.

32. Chase's refusal to tender the funds has unjustly enriched Chase to the detriment of COFIEC.

WHEREFORE, COFIEC demands judgment against Chase for compensatory damages, plus prejudgment interest, costs and for such further relief as this Court deems just and proper.

COUNT IV – CONSTRUCTIVE TRUST

COFIEC adopts and realleges each and every allegation contained in paragraphs 1 through 19 of this Complaint as though more fully set forth herein, and alleges further:

33. Despite the fact that COFIEC is entitled to the interest on the Obligations that accrued prior to July 31, 1990, Chase has been paid the interest money and has refused to tender said monies to COFIEC.

34. As a result of Chase's wrongful conduct, its abuse of COFIEC's confidence, and other questionable means, Chase has gained for itself something which, in

equity and in good conscience, it should not be permitted to hold.

35. Specifically, as a result of Chase's wrongful conduct with respect to COFIEC, Chase has gained the interest on the Obligations that accrued prior to July 31, 1990.

39. Because Chase is not, in good faith, entitled to the interest on the Obligations that accrued prior to July 31, 1990, a constructive trust should be imposed on the monies.

WHEREFORE, COFIEC requests this Honorable Court to enter an order imposing a constructive trust on the monies received by Chase, representing interest on the Obligations that accrued prior to July 31, 1990, in favor of COFIEC, and for such further relief as this Court deems just and proper.

COUNT V – INDEMNIFICATION

COFIEC adopts and realleges each and every allegation contained in paragraphs 1 through 19 of this Complaint as though more fully set forth herein, and alleges further:

36. This is an action for common law indemnification.

37. Claims have been made against COFIEC by Merrill, SBC and SPB in connection with the interest due to them under their respective Assignment to COFIEC.

38. COFIEC has incurred, and will continue to incur, attorneys' fees and costs in connection with the claims by Merrill, SBC and SPB.

39. As more fully set forth herein, COFIEC's inability to repay the interest to Merrill, SBC and SPB is due solely to the actions of Chase.

WHEREFORE, COFIEC demands judgment against Chase in an amount sufficient to indemnify COFIEC for all damages suffered by COFIEC, including attorneys' fees and costs, in connection with the claims raised by Merrill, SBC and SPC, and for such further relief as this Court deems just and proper.

DEMAND FOR JURY TRIAL

COFIEC demands a trial by jury on all issues triable as of right by a jury.

Respectfully submitted,

DELGADO, BEFELER, STARKMAN
& MAGOLNICK, P.A.
3700 NationsBank Tower
100 S.E. 2nd Street
Miami, FL 33131
(305) 379-8300

By: /s/ Joel S. Magolnick
Joel S. Magolnick
Jay Starkman

October 15, 1990

Compania Financiera Ecuatoriana de Desarrollo S.A.
Avenidas Patria y Amazonas
Quito – Ecuador
Attn: Mr. Arturo Quiroz Martin

Re: ASSIGNMENT and AGREEMENT (the "Agreement"), dated as of October 15, 1990, between Manufacturers Hanover Trust Company (the *"ASSIGNEE"*) and Compania Financiera Ecuatoriana de Desarrollo S.A. (the *"ASSIGNOR"*)

Dear Martin:

This letter agreement (the "Letter Agreement") will confirm that the ASSIGNEE has agreed to effectuate the assignment provided for in the above-referenced agreement in accordance with the terms thereof effective on October 15, 1990 (the *"Effective Date"*). As consideration for such assignment, the ASSIGNEE will pay to the ASSIGNOR on or prior to the Effective Date the amount of U.S. $857,124.99 at Manufacturers Hanover Trust Company, 4 New York Plaza, New York, New York 10015, for account of COFIEC, account number 544-0-25206, attention: Mr. Arturo Quiroz Martin, reference: Ecuador Debt (US $6,270,000.00). The amounts will be payable in U.S. Dollars and in same day funds (or such other funds as may from time to time be customary for the settlement in New York of international banking transactions in U.S. Dollars).

If the foregoing is in accordance with your understanding, please indicate your agreement by signing and returning the enclosed copy of this Letter Agreement.

Very Truly Yours,

Manufacturers Hanover Trust Company

By /s/ _____
Title: Vice President

Agreed to and Accepted
this Fifteenth day of October, 1990

Compania Financiera Ecuatoriana de Desarrollo S.A.

By /s/ _____
Title: President

ASSIGNMENT and AGREEMENT (the *"Agreement"*), dated as of October 15, 1990 between Manufacturers Hanover Trust Company (the *"ASSIGNEE"*) and Compania Financiera Ecuatoriana de Desarrollo S.A. (the *"ASSIGNOR"*).

The parties hereto hereby agree as follows:

1. *Assignment.* In accordance with the terms hereof and of a certain letter agreement (the *"Letter Agreement"*), dated the date hereof, from the ASSIGNOR to the ASSIGNEE, the ASSIGNOR hereby assigns and transfers to the ASSIGNEE without recourse all the ASSIGNOR's rights with respect to U.S. $6,270,000.00 in aggregate principal amount of the ASSIGNOR's loans (the *"Assigned Loans"*) under each of the Agreements set forth in Exhibit A attached hereto. For the purposes of this assignment,

the agreement(s) identified in Exhibit A, are referred to collectively as the *"Assigned Agreements"*.

2. *Acceptance; Assumption*. The ASSIGNEE hereby accepts the assignment and transfer to it by the ASSIGNOR of all the ASSIGNOR's rights and assumes all the ASSIGNOR's obligations with respect to the Assigned Loans and agrees, pursuant to the relevant sections in each of the Assigned Agreements, to be bound with respect to such Assigned Loans as fully and to the same extent as if the Assigned Loans were originally credits of the ASSIGNEE under the Assigned Agreements.

3. *Representations*. (a) Except as otherwise expressly provided herein, each of the parties shall not be deemed to have made, and hereby disclaims, any representations and warranties whatsoever, either express or implied, including, without limitation, any representation or warranty as to:

(i) the due execution, legality, validity, adequacy or enforceability of any of the Assigned Agreements or any document relating thereto;

(ii) the accuracy or completeness of any documentation or information supplied by it in connection with the Assigned Agreements and the transactions contemplated herein;

(iii) the financial condition of the Obligor identified in Exhibit A hereto (the *"Obligor"*), or the Guarantor identified in Exhibit A hereto (the *"Guarantor"*), in relation to the Assigned Loans or the Assigned Agreements; or

(iv) the performance by the Obligor or Guarantor, of its respective obligations under the Assigned Agreements.

(b) The ASSIGNOR hereby represents and warrants that it has not heretofore, and prior to October 15, 1990 (the "*Effective Date*") will not have, assigned, charged or pledged the whole or any part of its right, title and interest in and to any of the Assigned Loans nor has it agreed so to do.

(c) The ASSIGNEE represents that it has been, and will continue to be, solely responsible for making its own independent appraisal of, and investigations into, the financial condition, creditworthiness, affairs, status and nature of the Obligors and the Guarantor; and has not relied and will not hereafter rely on the ASSIGNOR to appraise or review on its behalf the financial condition, creditworthiness, affairs, status or nature of the Obligors and the Guarantor.

(d) Each of the ASSIGNOR and the ASSIGNEE represents and warrants to the other that it has the power to enter into this Agreement and to exercise its rights and perform its obligations hereunder and that all action required to authorize its execution of this Agreement and the performance of its obligations hereunder has been duly taken.

4. *Further Documentation.* Each of the ASSIGNOR and the ASSIGNEE shall execute and deliver the Joint Notice of Assignment and Agreement to be Bound, attached hereto as Exhibit B, [B-1, B-2, ETC. AS NECESSARY] and any such further documents or instruments as may be necessary or appropriate to implement the terms

of this Agreement, including, without limitation, any such documents for the purpose of recording the assignment and transfer herein contained.

5. *Payment of Interest and Principal.* (a) Each of the ASSIGNOR and the ASSIGNEE agrees that interest on the principal amounts of the Assigned Loans which accrues prior to the Effective date and interest thereon which accrues on or after the Effective Date shall also be for the account of the ASSIGNEE and payments and prepayments of the principal amounts of the Assigned Loans payable on or after the effective date shall be for the account of the ASSIGNEE.

(b) If either the ASSIGNOR or the ASSIGNEE receives any payment of interest or principal which is for the account of the other (the amounts of any such payment of interest or principal which are for the accounts of parties being determined, in the case of a payment of interest, in proportion to the interest accrued to each of the parties at the date of payment and, in the case of a payment of principal, in proportion to the principal owed to the parties at the date of payment) then the ASSIGNOR or the ASSIGNEE, as the case may be, shall hold the same in trust for the other and shall promptly pay the same to the other.

6. *Law.* This Agreement shall be governed by, and construed and interpreted in accordance with, the law of the State of New York, United States of America.

7. *Counterparts.* This Agreement may be executed in any number of counterparts and by different parties hereto in separate counterparts, each of which when so executed shall be deemed to be an original and all of

which taken together shall constitute one and the same agreement.

8. *Severability.* If any provision hereof shall be held to be void, illegal or unenforceable, it shall be deemed severable from the remaining provisions hereof which shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their respective officials, officers or agents thereunto duly authorized as of the date first above written.

Manufacturers Hanover Trust Company

By /s/ _____
Title: Vice President

Address: 270 Park Avenue
New York, New York 10017
Attn: Robert J. Salvador
Vice President

Compania Financiera Ecuatoriana
de Desarrollo S.A.

By /s/ _____
Title: President

Address: Avenidas Patria y Amazonas
Quito – Ecuador
Attn: Mr. Arturo Quiroz
Martin

EXHIBIT A

TO ASSIGNMENT AND AGREEMENT DATED OCTOBER 15, 1990 BETWEEN ASSIGNEE AND ASSIGNOR

AGGREGATE TOTAL AMOUNT: U.S. $2,709,653.27

OBLIGOR: Banco Central del Ecuador

GUARANTOR: The Republic of Ecuador

AGREEMENT: Banco Central del Ecuador DFLA Consolidation Agreement dated August 15, 1986

SERVICING BANK: Citibank N.A.

The Assigned Loan (Tranche 1) identifed as follows:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 1	2,709,653.27	2,709,653.27

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: LIBOR = 8 1/8% + MARGIN = 1 3/8% = ALL IN 9 1/2%

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST REATE: LIBOR = ___% + MARGIN = ___% = ALL IN 9 1/2%

AGGREGATE TOTAL AMOUNT: U.S. $290,346.73

OBLIGOR: Banco Central del Ecuador

GUARANTOR: The Republic of Ecuador

AGREEMENT: Banco Central del Ecuador DFLA Consolidation Agreement dated August 15, 1986

SERVICING BANK: Citibank N.A.

The Assigned Loan (Tranche 2) identifed as follows:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 2	290,346.73	290,346.73

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: LIBOR = 8 1/8% + MARGIN = 1 3/8% = ALL IN 9 1/2%

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST
REATE: LIBOR = ___% +
MARGIN = ___% = ALL IN 9 1/2%

AGGREGATE TOTAL AMOUNT: U.S. $1,270,000.00

OBLIGOR: Banco Central del Ecuador

GUARANTOR: The Republic of Ecuador

AGREEMENT: Banco Central del Ecuador DFLA Consolidation Agreement dated August 15, 1986

SERVICING
BANK: Citibank N.A.

The Assigned Loan (Tranche 4) identifed as follows:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 4	1,270,000.00	1,270,000.00

INTEREST
PERIOD: July 31, 1990 TO October 31, 1990

INTEREST
RATE: LIBOR = 8 1/8% +
MARGIN = 2 1/4% = ALL IN 10 3/8%

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned

INTEREST
PERIOD: July 31, 1990 TO October 31, 1990

INTEREST REATE: LIBOR = ___% +
MARGIN = ___% = ALL IN $10^{3}/_{8}$%

AGGREGATE TOTAL AMOUNT: U.S. $2,000,000.00

OBLIGOR: Banco Central del Ecuador

GUARANTOR: The Republic of Ecuador

AGREEMENT: Banco Central del Ecuador DFLA Consolidation Agreement dated August 15, 1986

SERVICING BANK: Citibank N.A.

The Assigned Loan (Tranche 5) identifed as follows:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 5	2,000,000.00	2,000,000.00

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: US DOMESTIC = 8.26% +
MARGIN = $2^{1}/_{4}$% = ALL IN 10.51%

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST
REATE: US DOMESTIC = ___% +
MARGIN = 2¼% = ALL IN 10.51%

JOINT
ASSIGNOR NOTICE OF ASSIGNMENT
ASSIGNEE AGREEMENT TO BE BOUND

To: Banco Central del Ecuador, as Obligor
Av. 10 De Agosto y Briseno
Quito, Ecuador
Attn: Gerente General
Telex: 2182 BANCEN ED

To: The Republic of Ecuador, as Guarantor
Address: Av. 10 De Agosto
1651 y Jorge Washington
Quito, Ecuador
Attn: Ministro de Finanzaz
Telex: 2358 MINFIN

To: Citibank, N.A., as Coordinating Agent
Address: 641 Lexington Avenue, 7th Floor
New York, New York 10022
Attn: Evelyn Faloki
Telex: RCA 236066 CIG WH UR or WU 127782
CIG WH NYK

Re: Banco Central del Ecuador DFLA
Consolidation Agreement dated August 15, 1986

From: Manufacturers Hanover Trust Company, as ASSIGNEE

Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR

Date: October 15, 1990

1. We refer to Section 11.07 (12.07 for 1985 MYRA) of the subject Agreement.

2. This notice relates to U.S. $2,709,653.27 of Loan(s) described below, which Loan(s) were outstanding and payable to Compania Financiera Ecuatoriana de Desarrollo S.A. (the "ASSIGNOR") under the Agreement.

3. This constitutes notice to each of you, pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement, of the assignment to Manufacturers Hanover Trust Company, NAME OF BRANCH (the "ASSIGNEE") of the principal amount indicated for the Loan(s) identified below:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 1	2,709,653.27	2,709,653.27

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: LIBOR = 8 1/8% +
MARGIN = 1 3/8% = ALL IN 9 1/2%

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned
INTEREST PERIOD:	July 31, 1990 TO October 31, 1990	
INTEREST REATE:	LIBOR = ___% + MARGIN = ___% =	ALL IN 9 1/2%

4. The ASSIGNEE agrees pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement that it is bound by the Agreement with respect to the interest in the Loans(s) identified in paragraph 3 above as fully and to the same extent as if it were the Bank to which the interest in such Loan(s) were originally payable under the Agreement.

5. The ASSIGNEE confirms that it is a bank or financial institution registered with the Ministry of Finance.

6. As between the undersigned, the assignment is effective from October 15, 1990.

8. The ASSIGNOR and the ASSIGNEE agree that the ASSIGNOR will pay the reasonable expenses of the Coordinating Agent to administer and record the foregoing assignment.

9. The ASSIGNEE advises each of you of the following administrative details with respect to the assigned interest in the Loan(s) and requests the Coordinating

Agent to acknowledge receipt of this document as a Correction Notice to the original Loan:

The following administrative details apply to the assignment identified in paragraph 3 above:

(A) Address for Notices:

Institution
Name: Manufacturers Hanover Trust Company
Address: 270 Park Avenue
New York, NY. 10017
Attention: Maria Gallego, AS, 15/270
Telephone: 212-270-1286
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

(b) Lending
Office: Manufacturers Hanover Trust Company, Asset Redeployment Group
(ARGTRAD), 270 Park Avenue, 15th Floor, New York, New York 10017

(C) Payment Instructions:

Institution
Name: Manufacturers Hanover Trust Company
Address: 4 New York Plaza
New York, N.Y. 10015

Account No: 544-7-76923
For A/C of: ARGTRAD
Reference: 1723/90
Attention: Accounting Department, 15/270
Telephone: 212-270-1293
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

10. This Agreement may be executed by the ASSIGNOR and ASSIGNEE in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

IN WITNESS WHEREOF, each of the undersigned has caused this agreement to be executed by its official, officer or agent thereunto duly authorized.

Manufacturers Hanover Trust Company, as ASSIGNEE

By _____
Michele Hirsch
Assistant Vice President

Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR

By /s/ _____
Title: PRESIDENT

JOINT
ASSIGNOR NOTICE OF ASSIGNMENT
ASSIGNEE AGREEMENT TO BE BOUND

To:	Banco Central del Ecuador, as Obligor
Address:	Av. 10 De Agosto y Briseno Quito, Ecuador
Attn:	Gerente General
Telex:	2182 BANCEN ED
To:	The Republic of Ecuador, as Guarantor
Address:	Av. 10 De Agosto 1651 y Jorge Washington Quito, Ecuador
Attn:	Ministro de Finanzaz
Telex:	2358 MINFIN
To:	Citibank, N.A., as Coordinating Agent
Address:	641 Lexington Avenue, 7th Floor New York, New York 10022
Attn:	Evelyn Faloki
Telex:	RCA 236066 CIG WH UR or WU 127782 CIG WH NYK
Re:	Banco Central del Ecuador DFLA Consolidation Agreement dated August 15, 1986
From:	Manufacturers Hanover Trust Company, as ASSIGNEE
	Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR
Date:	October 15, 1990

1. We refer to Section 11.07 (12.07 for 1985 MYRA) of the subject Agreement.

2. This notice relates to U.S. $290,346.73 of Loan(s) described below, which Loan(s) were outstanding and payable to Compania Financiera Ecuatoriana de Desarrollo S.A. (the "ASSIGNOR") under the Agreement.

3. This constitutes notice to each of you, pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement, of the assignment to Manufacturers Hanover Trust Company, NAME OF BRANCH (the "ASSIGNEE") of the principal amount indicated for the Loan(s) identified below:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 2	290,346.73	290,346.73

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: LIBOR = 8 1/8% +
MARGIN = 1 3/8% = ALL IN 9 1/2%

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST REATE: LIBOR = ___% +
MARGIN = ___% = ALL IN 9 1/2%

4. The ASSIGNEE agrees pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement that it is bound by the Agreement with respect to the interest in the Loans(s) identified in paragraph 3 above as fully and to the same extent as if it were the Bank to which the interest in such Loan(s) were originally payable under the Agreement.

5. The ASSIGNEE confirms that it is a bank or financial institution registered with the Ministry of Finance

6. As between the undersigned, the assignment is effective from October 15, 1990.

8. The ASSIGNOR and the ASSIGNEE agree that the ASSIGNOR will pay the reasonable expenses of the Coordinating Agent to administer and record the foregoing assignment.

9. The ASSIGNEE advises each of you of the following administrative details with respect to the assigned interest in the Loan(s) and requests the Coordinating Agent to acknowledge receipt of this document as a Correction Notice to the original Loan:

The following administrative details apply to the assignment identified in paragraph 3 above:

(A) Address for Notices:

Institution

Name:	Manufacturers Hanover Trust Company
Address:	270 Park Avenue New York, NY. 10017

Attention: Maria Gallego, AS, 15/270
Telephone: 212-270-1286
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

(b) Lending
Office: Manufacturers Hanover Trust Company, Asset Redeployment Group
(ARGTRAD), 270 Park Avenue, 15th Floor, New York, New York 10017

(C) Payment Instructions:

Institution
Name: Manufacturers Hanover Trust Company
Address: 4 New York Plaza
New York, N.Y. 10015
Account No: 544-7-76923
For A/C of: ARGTRAD
Reference: 1723/90
Attention: Accounting Department, 15/270
Telephone: 212-270-1293
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

10. This Agreement may be executed by the ASSIGNOR and ASSIGNEE in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

IN WITNESS WHEREOF, each of the undersigned has caused this agreement to be executed by its official, officer or agent thereunto duly authorized.

Manufacturers Hanover Trust Company, as ASSIGNEE

By _____
Michele Hirsch
Assistant Vice President

Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR

By /s/ _____
Title: PRESIDENT

[EXHIBIT B]

JOINT
ASSIGNOR NOTICE OF ASSIGNMENT
ASSIGNEE AGREEMENT TO BE BOUND

To:	Banco Central del Ecuador, as Obligor
Address:	Av. 10 De Agosto y Briseno Quito, Ecuador
Attn:	Gerente General
Telex:	2182 BANCEN ED
To:	The Republic of Ecuador, as Guarantor
Address:	Av. 10 De Agosto 1651 y Jorge Washington Quito, Ecuador
Attn:	Ministro de Finanzaz
Telex:	2358 MINFIN
To:	Citibank, N.A., as Coordinating Agent
Address:	641 Lexington Avenue, 7th Floor New York, New York 10022
Attn:	Evelyn Faloki
Telex:	RCA 236066 CIG WH UR or WU 127782 CIG WH NYK
Re:	Banco Central del Ecuador DFLA Consolidation Agreement dated August 15, 1986
From:	Manufacturers Hanover Trust Company, as ASSIGNEE
	Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR
Date:	October 15, 1990

1. We refer to Section 11.07 (12.07 for 1985 MYRA) of the subject Agreement.

2. This notice relates to U.S. $1,270,000.00 of Loan(s) described below, which Loan(s) were outstanding and payable to Compania Financiera Ecuatoriana de Desarrollo S.A. (the "ASSIGNOR") under the Agreement.

3. This constitutes notice to each of you, pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement, of the assignment to Manufacturers Hanover Trust Company, NAME OF BRANCH (the "ASSIGNEE") of the principal amount indicated for the Loan(s) identified below:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 4	1,270,000.00	1,270,000.00

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: LIBOR = $8\frac{1}{8}\%$ +
MARGIN = $2\frac{1}{4}\%$ = ALL IN $10\frac{3}{8}\%$

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST REATE: LIBOR = ___ % +
MARGIN = ___ % = ALL IN $10\frac{3}{8}\%$

4. The ASSIGNEE agrees pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement that it is bound by the Agreement with respect to the interest in the Loans(s) identified in paragraph 3 above as fully and to the same extent as if it were the Bank to which the interest in such Loan(s) were originally payable under the Agreement.

5. The ASSIGNEE confirms that it is a bank or financial institution registered with the Ministry of Finance

6. As between the undersigned, the assignment is effective from October 15, 1990.

8. The ASSIGNOR and the ASSIGNEE agree that the ASSIGNOR will pay the reasonable expenses of the Coordinating Agent to administer and record the foregoing assignment.

9. The ASSIGNEE advises each of you of the following administrative details with respect to the assigned interest in the Loan(s) and requests the Coordinating Agent to acknowledge receipt of this document as a Correction Notice to the original Loan:

The following administrative details apply to the assignment identified in paragraph 3 above:

(A) Address for Notices:

Institution
Name: Manufacturers Hanover Trust Company
Address: 270 Park Avenue
New York, NY. 10017

Attention: Maria Gallego, AS, 15/270
Telephone: 212-270-1286
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

(b) Lending
Office: Manufacturers Hanover Trust Company, Asset Redeployment Group (ARGTRAD), 270 Park Avenue, 15th Floor, New York, New York 10017

(C) Payment Instructions:

Institution
Name: Manufacturers Hanover Trust Company
Address: 4 New York Plaza
New York, N.Y. 10015
Account No: 544-7-76923
For A/C of: ARGTRAD
Reference: 1723/90
Attention: Accounting Department, 15/270
Telephone: 212-270-1293
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

10. This Agreement may be executed by the ASSIGNOR and ASSIGNEE in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

IN WITNESS WHEREOF, each of the undersigned has caused this agreement to be executed by its official, officer or agent thereunto duly authorized.

Manufacturers Hanover Trust Company, as ASSIGNEE

By _____
Michele Hirsch
Assistant Vice President

Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR

By /s/ _____
Title:

[EXHIBIT B]

JOINT
ASSIGNOR NOTICE OF ASSIGNMENT
ASSIGNEE AGREEMENT TO BE BOUND

To:	Banco Central del Ecuador, as Obligor
Address:	Av. 10 De Agosto y Briseno Quito, Ecuador
Attn:	Gerente General
Telex:	2182 BANCEN ED
To:	The Republic of Ecuador, as Guarantor
Address:	Av. 10 De Agosto 1651 y Jorge Washington Quito, Ecuador
Attn:	Ministro de Finanzaz
Telex:	2358 MINFIN
To:	Citibank, N.A., as Coordinating Agent
Address:	641 Lexington Avenue, 7th Floor New York, New York 10022
Attn:	Evelyn Faloki
Telex:	RCA 236066 CIG WH UR or WU 127782 CIG WH NYK
Re:	Banco Central del Ecuador DFLA Consolidation Agreement dated August 15, 1986
From:	Manufacturers Hanover Trust Company, as ASSIGNEE
	Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR
Date:	October 15, 1990

1. We refer to Section 11.07 (12.07 for 1985 MYRA) of the subject Agreement.

2. This notice relates to U.S. $2,000,000.00 of Loan(s) described below, which Loan(s) were outstanding and payable to Compania Financiera Ecuatoriana de Desarrollo S.A. (the "ASSIGNOR") under the Agreement.

3. This constitutes notice to each of you, pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement, of the assignment to Manufacturers Hanover Trust Company, NAME OF BRANCH (the "ASSIGNEE") of the principal amount indicated for the Loan(s) identified below:

	U.S. Dollar Outstanding Principal Amount	U.S. Dollar Principal Amount of Credit to be Assigned
Tranche 5	2,000,000.00	2,000,000.00

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: US DOMES = 8.26% +
MARGIN = 2 1/4% = ALL IN 10.51%

The Overdue Interest identified as follows:

	U.S. Dollar Outstanding Amount	U.S. Dollar Amount to be Assigned

INTEREST PERIOD: July 31, 1990 TO October 31, 1990

INTEREST RATE: US DOMESTIC = ___ % +
MARGIN = 2 1/4% = ALL IN 10.51%

4. The ASSIGNEE agrees pursuant to Section 11.07 (12.07 for 1985 MYRA) of the Agreement that it is bound by the Agreement with respect to the interest in the Loans(s) identified in paragraph 3 above as fully and to the same extent as if it were the Bank to which the interest in such Loan(s) were originally payable under the Agreement.

5. The ASSIGNEE confirms that it is a bank or financial institution registered with the Ministry of Finance.

6. As between the undersigned, the assignment is effective from October 15, 1990.

8. The ASSIGNOR and the ASSIGNEE agree that the ASSIGNOR will pay the reasonable expenses of the Coordinating Agent to administer and record the foregoing assignment.

9. The ASSIGNEE advises each of you of the following administrative details with respect to the assigned interest in the Loan(s) and requests the Coordinating Agent to acknowledge receipt of this document as a Correction Notice to the original Loan:

The following administrative details apply to the assignment identified in paragraph 3 above:

(A) Address for Notices:

Institution

Name: Manufacturers Hanover Trust Company

Address: 270 Park Avenue
New York, NY. 10017

Attention: Maria Gallego, AS, 15/270
Telephone: 212-270-1286
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

(b) Lending
Office: Manufacturers Hanover Trust Company, Asset Redeployment Group
(ARGTRAD), 270 Park Avenue, 15th Floor, New York, New York 10017

(C) Payment Instructions:

Institution
Name: Manufacturers Hanover Trust Company
Address: 4 New York Plaza
New York, N.Y. 10015
Account No: 544-7-76923
For A/C of: ARGTRAD
Reference: 1723/90
Attention: Accounting Department, 15/270
Telephone: 212-270-1293
Telefax: 212-270-5805/6966
Telex
(Answerback): 232337 S MHT UR
12211 MHTNY UD

10. This Agreement may be executed by the ASSIGNOR and ASSIGNEE in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

IN WITNESS WHEREOF, each of the undersigned has caused this agreement to be executed by its official, officer or agent thereunto duly authorized.

Manufacturers Hanover Trust Company, as ASSIGNEE

By _____
Michele Hirsch
Assistant Vice President

Compania Financiera Ecuatoriana de Desarrollo S.A., as ASSIGNOR

By /s/ _____
Title: PRESIDENT